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COURT OF CRIMINAL APPEALS
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In the
Court of Criminal Appeals

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COURT OF CRIMINAL APPEALS
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No. 01-15-00871-CR
In the Court of Appeals for the First District of Texas at Houston

No. 1387897
In the 209th District Court of Harris County, Texas

JUSTIN TIRRELL WILLIAMS
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT PERMITTED

STATEMENT REGARDING ORAL ARGUMENT

This Court has not permitted oral argument in this case. And none is required.

IDENTIFICATION OF THE PARTIES

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Appellant or criminal defendant:

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Counsel for Appellant:

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Randy Martin; Ben Friedman — Assistant Public Defenders at trial

Trial Judge:

Hon. Terry Flenniken — Presiding Judge

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STATEMENT OF THE CASE

The appellant was charged in cause number 1387897 with the aggravated robbery of a woman (CR7 – 10). He was also charged in cause number 1387898 with the aggravated kidnapping of that same woman committed that same date (CR8 – 10). And he was charged in cause number 1387899 with the aggravated sexual assault of that woman, also committed on the same date (CR9 – 9).

A jury found the appellant guilty in all three cases and assessed punishment as follows: 40 years in prison for the aggravated robbery, 60 years in prison for the aggravated kidnapping, and 99 years in prison for the aggravated sexual assault (CR7 – 126) (CR8 – 98) (CR9 – 90). The court of appeals affirmed the convictions, but held that similar court costs could only be assessed in one of the cases and choose the lowest cause number, specifically, cause number 1387897, which is the aggravated robbery case. *Williams v. State*, 495 S.W.3d 583 (Tex. App.—Houston [1st Dist.] 2016, pet. granted). The appellant filed a petition for discretionary review only in that cause number, and this Court granted review.

GROUNDS FOR REVIEW

1. This ground of review assumes that a separate $5 court cost for releasing a defendant from jail is appropriate. The Court of Appeals upheld the trial court's assessment of a $5 cost for "release" because the defendant was "released" to prison. Did the Court of Appeals err in affirming the assessment of a cost for "release" when the defendant was "released" to prison?

2. This ground of review assumes that a $5 cost for releasing a defendant to prison is appropriate. Costs for peace officer services are to be assessed for services performed "in the case." The Court of Appeals upheld the trial court's assessment of a $5 cost even though the sheriff released Mr. Williams to prison following trial. Did the Court of Appeals err in upholding the cost assessment because the release occurred after the trial concluded?

3. This ground of review assumes a $5 cost for releasing a defendant to prison is appropriate even though the release occurs after trial. The Court of Appeals upheld the $5 cost's assessment even though there had been no release at the time the bill of costs was prepared. Did the Court of Appeals err in affirming the assessment of a cost for which a service had not yet been performed?

STATEMENT OF FACTS

Jane[1] was a 22-year-old student going for her doctorate in physical therapy at UTMB in Galveston (RR. IV – 21) (St. Ex. 16). In 2013, she was still attending the University of Houston to obtain her degree in kinesiology when she met a man named Dewayn Peace, who was in the same program with her (RR. III – 19-20) (RR. IV – 22, 26). Peace lived at the Catalina Village apartment complex (RR. III – 19) (RR. IV – 26). On March 29, Jane drove over to his apartment complex to visit him, and he was expecting her (RR. III – 25) (RR. IV – 26-27).

When Jane arrived at Catalina Village, she parked her car and started walking into the complex, but then decided to move the vehicle to a better space that was marked for visitors (RR. IV – 29-30). Once she had moved, she locked her car and started toward the apartment building (RR. IV – 32). But the appellant intercepted her; he grabbed her and threw her to the ground (RR. IV – 32). Jane screamed, but the appellant said "shut up" and threatened to shoot her if she "did

[1] A public servant who has "access to the name, address, or telephone number of a victim 17 years of age or older who has chosen a pseudonym under this chapter commits an offense if the public servant knowingly discloses the name, address, or telephone number of the victim to any person who is not assisting in the investigation or prosecution of the offense or to any person other than the defendant, the defendant's attorney, or the person specified in the order of a court of competent jurisdiction" TEX. CODE CRIM. PROC. art. 57B.03(a) (West 2014). The term "victim" means a person who was the subject of: "(A) an offense that allegedly constitutes family violence, as defined by Section 71.004, Family Code; or (B) an offense that is part of the same criminal episode, as defined by Section 3.01, Penal Code, as an offense described by Paragraph (A)." TEX. CODE CRIM. PROC. art. 57B.01 (4) (West 2010). The release or disclosure of such information to any person is a class C misdemeanor. TEX. CODE CRIM. PROC. art. 57B.03(d) (West 2010). Therefore, the pseudonym "Jane" will be used for the victim in this case.

anything stupid." (RR. IV – 32). She said, "You can have anything, just let me go, please." (RR. IV – 33).

The appellant grabbed Jane's bag and started looking for her keys (RR. IV – 33). He pulled her up, put his silver revolver to her side, told her to walk toward the car, and made her get into the driver's seat (RR. IV – 33). The appellant's accomplice, Shanador Thomas, appeared and got in the back seat of the car (RR. III – 123) (RR. IV – 33-34). The appellant handed the gun to Thomas and said, "If she does anything stupid [] shoot her." (RR. IV – 33-34, 36). He then walked around the car and got into the front passenger's seat (RR. IV – 34). The appellant told Jane to drive out of the apartment complex while he looked through her wallet (RR. IV – 35).

Meanwhile, Peace was worried because Jane had not yet arrived at his apartment (RR. III – 25-26). Brendan Morley with the Houston Police Department (HPD) was dispatched to the complex in response to a kidnapping call (RR. III – 36). He spoke with Peace and another witness, but Jane was already gone (RR. III – 26, 37-38).

The appellant asked Jane who she banked with and she answered (RR. IV – 36). As they passed a Bank of America, Jane stated that she could get money from that ATM, so they pulled into the line of waiting cars (RR. IV – 37). As they were sitting in line, the appellant asked Jane if she was dating anyone (RR. IV – 37).

Her phone was ringing, and the appellant said, "Somebody must be looking for you or something." (RR. IV – 37).

When they reached the ATM, the appellant kept handing Jane different cards to withdraw money, and some of those transactions were captured on the ATM's surveillance camera (RR. IV – 38-41) (St. Ex. 47-48). Thomas grabbed Jane's jacket and tried to conceal himself from the ATM's camera (RR. IV – 39, 41, 44). Jane was hoping that she could eventually get away if she gave them as much money as they wanted (RR. IV – 41). After using the Bank of America ATM, they crossed the street and used the Chase Bank ATM (RR. IV – 44). When they were finished with the ATMs, they told Jane to drive away (RR. IV – 44-45).

As they continued driving, they asked Jane whether she had a boyfriend and whether she was a virgin (RR. IV – 45). They also asked her, "What would you do to keep your life?" (RR. IV – 45). She answered, "anything." (RR. IV – 45). The appellant asked, "Would you have sex or would you suck my dick." (RR. IV – 45). Jane did not answer; but the appellant asked again, and Jane eventually said "yes" because she thought that they would shoot her (RR. IV – 45). The appellant turned to Thomas and said, "Did you hear that?" (RR. IV – 45). He told Jane to keep driving (RR. IV – 45).

The appellant and Thomas made Jane drive down a dark dead-end street and pull onto a gravel road (RR. IV – 46-47). The appellant told Jane to turn off the

car, to turn around, and to perform oral sex on Thomas in the back seat while the appellant recorded it with Jane's cell phone (RR. IV – 48). The appellant also made Jane perform oral sex on him while saying that he was going to have sex with her (RR. IV – 48). Jane told him that she was on her period and had a tampon in, so Thomas pulled down her pants to verify her claim (RR. IV – 49). Nevertheless, the appellant stated that it did not matter because he had a condom (RR. IV – 49).

The appellant again made Jane perform oral sex on Thomas in the back seat while the appellant attempted to have sex with Jane, but he realized that there was not enough room in the car (RR. IV – 49). So he made Jane get out and perform oral sex on Thomas from outside the car while the appellant put a condom on his penis (RR. IV – 49). He penetrated Jane's vagina with his penis (RR. IV – 50). One of the men also penetrated Jane's anus with a finger (RR. IV – 50-51). When the appellant was finished, he pulled off the condom and threw it (RR. IV – 50). The men ordered Jane back in the car at gunpoint, and they all resumed their same seats (RR. IV – 50).

The appellant forced Jane to drive around the neighborhood for a few minutes and then told her to stop (RR. IV – 51). He made her get out of the car while Thomas jumped into the front seat (RR. IV – 51-52). Jane turned and started running away with only the clothes that she was wearing (RR. IV – 52). She was

afraid to wave at cars because she thought that the appellant might see her (RR. IV – 53). She ran all the way back to the apartment complex (RR. IV – 53). There were already some police cars at the back gate (RR. IV – 53-54).

Peace saw her and ran to her (RR. IV – 54). She was screaming and crying; she told him that she had been taken and raped (RR. III – 27, 40-42). The police took her to the hospital where a rape examination was performed on her (RR. IV – 58). There was physical evidence of penetration (RR. III – 80). She had a bleeding tear to her anus (RR. III – 81). There was blunt force trauma to her hymen (RR. III – 80-82). And her tampon had to be extracted from underneath her cervix (RR. III – 73, 82).

Rhona Jones with HPD's sex crimes unit was assigned the follow-up investigation (RR. III – 98). She obtained the ATM video evidence and had Jane make a composite sketch of the suspects (RR. III – 102-103). Jane also described the tattoo of one of the suspects as a heart with writing on his right forearm (RR. III – 120).

Jones and Jane drove around the neighborhood where the crimes had been committed, and they were eventually able to find the particular dead-end street (RR. III – 110-111). Jane had an emotional breakdown when they found it (RR. III – 111). They also found several condoms and several condom wrappers (RR. III – 119). The appellant's DNA was found in vaginal swabs taken from Jane, swabs

taken from her tampon and sanitary pad, and swabs taken from a condom discovered at the scene (RR. III – 212) (RR. IV – 7-15) (St. Ex. 18). Furthermore, the appellant had a tattoo that matched Jane's description (RR. III – 120, 123) (St. Ex. 35).

SUMMARY OF THE ARGUMENT

The court of appeals held that the Harris County Sheriff was required to release appellant into the possession of the prison system. Therefore, the Harris County Sheriff was entitled to collect the $5 fee for the work and expenses required for such a transfer of custody, which constituted a release from the Harris County Sheriff's custody. The court of appeals properly affirmed the imposition of such a fee.

ARGUMENT

The appellant claims that he should not have been assessed a court cost for his release from jail. (App'nt PDR Brf. 12). When the imposition of court costs is challenged on appeal, the appellate court must review the assessment of court costs to determine whether there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost. *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014). In other words, this Court cannot apply the

traditional standard of review for sufficiency of the evidence. *Id*.; *Petty v. State*, 438 S.W.3d 784, 803 (Tex. App.–Houston [1st Dist.] 2014, pet. ref'd).

The appellant was properly assessed a fee for release from the Harris County Jail because the judgment ordered the sheriff to deliver the appellant to the director of the prison system.

Article 973 of the original Code of Criminal Procedure of 1857 provided in part: "To the Sheriff shall be paid….For each commitment or release, one dollar." TEX. CODE CRIM. PROC. art. 973 (The News Office, Galveston 1857) (available at http://www.lrl.state.tx.us/scanned/statutes_and_codes/code_of_criminal_procedure.pdf). The sheriff remained the party to the paid for the commitment or release until the recodifications in 1985 and 1987. *See* TEX. CODE CRIM. PROC. art. 53.01 (West 1983) ("The following fees shall be allowed the sheriff, or other peace officer performing the same services in misdemeanor cases, to be taxed against the defendant on conviction:…For each commitment or release, $2.00.").

In 1985, the language that had been in Article 973 and in Article 53.01 was changed with the recodification of the provision into Chapter 102; the new statute provided that a convicted defendant must "pay the following fees for services performed in the case by a peace officer:…$2 for a commitment or release." Act of May 17, 1985, 69th Leg., R.S., ch. 269, §1, 1985 Tex. Sess. Law Serv. 1301 (West). But despite the changed language, the Legislature asserted that the

legislation was "intended as a recodification only, and no substantive change in the law is intended by this Act." Act of May 17, 1985, 69th Leg., R.S., ch. 269, §6, 1985 Tex. Sess. Law Serv. 1307 (West). Thus, while the current statute at Article 102.011 provides that a defendant "shall pay the following fees for services performed in the case by a peace officer," the legislative intent is that the sheriff be compensated for the sheriff's expenses in committing or releasing a prisoner from the custody of the sheriff. *See* TEX. CRIM. PROC. CODE art. 102.011(a)(6) (West 2014).

The judgment in this case ordered the Harris County Sheriff "to take, safely escort, and deliver Defendant to the Director, Institutional Division, TDCJ." (CR7 – 127). Furthermore, the judgment ordered that the defendant be confined in the "Institutional Division, TDCJ," not in the sheriff's county jail (CR7 – 126-127). Thus, as a result of the appellant's criminal activity and conviction, the Harris County Sheriff was required to release the appellant to the possession of the prison system. And the relevant court cost statute allows the Harris County Sherriff to recoup this expense. TEX. CRIM. PROC. CODE art. 102.011(a)(6) (West 2014). Therefore, the appellant's three grounds for review lack merit and should be overruled.

In his first ground for review, the appellant claims that "there is a legitimate question as to whether releasing a defendant to the prison system is really a release

at all." (App'nt PDR Brf. 15). He compares the concept to catching and releasing fish and claims that "[n]o one would say that turning the fish over to a fish packer for someone's eventual meal would be releasing the fish." (App'nt PDR Brf. 16). But of course, the appellant in the present case was not being released to the Soylent Green factory, he was being released to a distinctly different environment that was outside of the Harris County Sheriff's control and from where he might eventually rejoin society. Such a concept is more akin to a catch and release in a stocked pond or in a fishery. Moreover, treating the termination of the sheriff's custody as a release fulfills the apparent legislative intent behind allowing the sheriff to recoup some of his expenses in handling prisoners.

If the appellant's interpretation of the term "release" were to prevail, the court costs for his release could not be collected until the appellant had been released from prison. But there is no provision for such a collection. Article 103.003 provides that "[d]istrict and county attorneys, clerks of district and county courts, sheriffs, constables, and justices of the peace may collect money payable under this title." TEX. CRIM. PROC. CODE art. 103.003 (West 2014). The collection statute does not permit the prison system to collect court costs under Title 2. Therefore, the appellant's interpretation of the term "release" cannot be correct, and that of the court of appeals should be affirmed.

Even if the appellant were correct in his assumption that the term "release" does not include a release by the sheriff to the custody of the prison system, such a transfer of custody would nevertheless constitute a commitment, which permits an assessment of the same $5 court cost. TEX. CRIM. PROC. CODE art. 102.011(a)(6) (West 2014). A "commitment order" is the warrant, process, or order by which a court directs a ministerial officer to take custody of a person. *Ex parte Hernandez*, 827 S.W.2d 858 (Tex. 1992); *In Interest of A.M.C.*, 491 S.W.3d 62, 64 n.1 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The order containing this directive need not take a particular form and may be a separate order issued by the court, an attachment or order issued by the clerk at the court's direction, or included in a contempt judgment. *Hernandez*, 827 S.W.2d at 858.

In the present case, as stated previously, the trial court ordered the Harris County Sheriff "to take, safely escort, and deliver Defendant to the Director, Institutional Division, TDCJ." (CR7 – 127). Thus, the judgment constituted a commitment order, the appellant was committed to the custody of the director of the prison system pursuant to that order, and the appellant was properly assessed a court cost for this service. *See* TEX. CRIM. PROC. CODE art. 102.011(a)(6) (West 2014). Therefore, the appellant's first ground for review should be overruled.

The appellant has conceded that his second ground for review lacks merit and should be denied. (App'nt PDR Brf. 21).

Finally, in his third ground for review, the appellant cites Article 103.002 for the premise that a court cannot assess "a cost for which a service had not yet been performed." (App'nt PDR Brf. 25). But the appellant failed to raise this Article 103.002 argument in the court of appeals, and the court of appeals never ruled on it. *Williams*, 495 S.W.3d at 591-592. Therefore, it is not preserved for appellate review. *See Turner v. State*, 443 S.W.3d 128, 129 n.1 (Tex. Crim. App. 2014) ("Appellant failed to make these arguments in the court of appeals and we decline to address them for the first time on discretionary review.").

Nevertheless, Article 103.002 provides: "An officer may not impose a cost for a service not performed or for a service for which a cost is not expressly provided by law." TEX. CRIM. PROC. CODE art. 103.002 (West 2014). Article 103.002 does not prohibit the imposition of a cost for a service not *yet* performed. It simply prohibits compensation for nonexistent or fraudulent expenditures. Indeed, the appellant concedes that he was in fact released to the prison system on November 5, 2016. (App'nt PDR Brf. 25). Thus, the service was performed, and Article 103.002 does not forbid the imposition of a cost for that service. Therefore, the appellant's third ground for review lacks merit and should be overruled.

PRAYER

It is respectfully requested that the opinion of the court of appeals and the court costs assessed by the trial court should be affirmed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 3,890 words in it; and (b) a copy of the foregoing instrument will be served by efile.txcourts.gov to:

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